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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,
v.
PEDRO CASTRO, ET AL.,
Respondents.

NANCY B. BEECHER, ET AL.,
Petitioners,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

J. ALBERT WOLL
815 Fifteenth St., N.W.
Washington, D.C. 20005

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
GEORGE H. COHEN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 637-5890
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
Respondents.

No. 82-246

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,

v.

PEDRO CASTRO, ET AL.,
Respondents.

No. 82-259

NANCY B. BEECHER, ET AL.,
Petitioners,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Public Em-

ployee Department, AFL-CIO (PED), respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the petitioners in these consolidated cases.

INTEREST OF THE AMICI CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The AFL-CIO is a federation of 99 national and international unions having a total membership of approximately 14,000,000 working men and women. The PED is composed of 30 of the AFL-CIO's affiliated unions having a total membership of 2,000,000 public employees.

The AFL-CIO and PED have consistently championed the rights of victims of discrimination to be made whole for the injuries caused thereby. The AFL-CIO's position in that respect is reflected by its joint brief with the United Steelworkers of America in *Franks* v. *Bowman Transportation Co.*, 424 U.S 747, advocating the result that this Court reached therein. There are, indeed, victims of discrimination in the fire-fighters case pending before this Court (those who took and failed the tests found to have violated Title VII) and those victims are, we believe, entitled to "rightful place" relief of the kind specified in *Franks*. But that is not the relief that has been awarded below. Instead, the lower courts have imposed a quota under which innocent employees who have statutory seniority rights to their jobs will be displaced by employees of another race who are *not* the victims of any discrimination.

The AFL-CIO has also consistently championed the rights of *private parties* to adopt, if they choose to do so, employment quotas in an effort to overcome the effects of past societal discrimination. The AFL-CIO's position in that respect is reflected by its joint brief with the United Steelworkers of America in *Steelworkers* v. *Weber*, 443 U.S. 193, advocating the result that this Court reached therein. But the instant case involves no privately adopted quotas, but rather quotas imposed by

courts as ostensible remedies for discrimination allegedly violative of Title VII and 42 U.S.C. §§ 1981 and 1983.

Movants wish to file this brief to make two points:

1. In light of this Court's holdings that unintentional discrimination does not violate either the Fourteenth Amendment or 42 U.S.C. § 1981, and the absence of any findings of intentional discrimination in these cases, the quota remedies at issue here cannot be predicated on §§ 1981 or 1983: where there are no violations there can be no remedies. That is a complete answer to the police case; in the fire-fighter case, where a violation of Title VII also was found, the question reduces to whether quota remedies are authorized by Title VII for proven acts of discrimination.

2. Title VII does *not* authorize courts to award quotas benefiting non-victims at the expense of innocent incumbent employees. The language of the statute, its legislative history, and historic principles of equity that Congress intended would apply in the formulation of remedies under Title VII all demonstrate that that is the judgment made by Congress.

The combined effect of our misgauging both how many printed pages the typed version of this brief as sent to the printer would make and how long it would take to bring our argument herein within the page limits set by this Court has resulted in this motion and the attached brief being only in final page proof on the due date, and in the filing of the requisite number of printed copies on the morning after the due date. To assure that our errors in these respects do not delay the processing of this case or prejudice the parties we have served that page proof on all counsel of record on the due date. Under these circumstances, we respectfully request that this motion be granted.

CONCLUSION

For the above-stated reasons, this motion for leave to file brief *amicus curiae* should be granted.

Respectfully submitted,

J. ALBERT WOLL
815 Fifteenth St., N.W.
Washington, D.C. 20005

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
GEORGE H. COHEN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present an issue that this Court has not yet addressed: Whether in an employment discrimination case a court may, in order to achieve a particular racial balance, direct that innocent employees be deprived of their jobs so that the jobs may be filled by persons of another race who were not found by the court to be the victims of any unlawful employment practice of the defendants.

As we show in part I of this brief, the only violations of law found in the long history of these cases involved unintentional discrimination. It is now established that such conduct does not violate either the Civil Rights Act of 1866, 42 U.S.C. § 1981, or the Fourteenth Amendment as enforceable through the Civil Rights Act of 1871, 42 U.S.C. § 1983. Those statutes, which were the sole grounds for relief asserted in the police case, therefore could not be the predicate for the additional relief—the layoff quotas—ordered by the courts below. In the fire-fighter case, a claim was also made under Title VII of the Civil Rights Act of 1964, which does prohibit the type of unintentional discrimination found below. Thus, the issue presented here arises only in the context of the Title VII claim made in the fire-fighter case.

In part II, we show that in 1964 the authors of Title VII intended that the statute would not authorize courts to issue orders that require quotas or preferences, or indeed any form of affirmative relief granting benefits to persons who were not victims of the violation that is the

predicate of the particular order. We show further in part II, that Congress in enacting certain amendments to Title VII in 1972 did not intend to alter the remedial scheme of the statute so as to allow court-ordered quotas, preferences, or any other form of affirmative relief for non-victims.

In part III, we show that this Court's cases regarding the remedial scope authorized by § 706(g) have consistently drawn the line as Congress intended: between make-whole relief for actual victims of discrimination, which is permitted, indeed required, and relief for non-victims, which is not permitted. We further show in part III, that the basic principles of equity recognized in this Court's cases preclude a court direction that, on the basis of race, an innocent employee be deprived of his job so that he may be replaced by an employee who was not the victim of any discrimination found by the court.

ARGUMENT

I

At no time in the long history of the Boston police and fire litigation has there been a finding of intentional discrimination. On the contrary, the lower courts have been explicit that the only violations committed in each case were *not* intentional. *Castro* v. *Beecher*, 459 F.2d 725, 727 (1st Cir. 1972) (police); *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (fire-fighters). That there was no intentional discrimination has an important bearing on the remedy questions before this Court.

In the police case, the violations predated the 1972 amendment extending the reach of Title VII to public employment, and the First Circuit stated that Title VII "would not seem to govern the purely past conduct at issue here", *Castro* v. *Beecher*, *supra*, 459 F.2d at 733 n.9. Rather, the "not intended" discrimination was found to violate only the Civil Rights Act of 1866, 42 U.S.C.

§ 1981, and the Fourteenth Amendment as enforceable through the Civil Rights Act of 1871, 42 U.S.C. § 1983—the First Circuit holding in 1972 that those sources forbade practices that have "racially discriminatory impact without intent." *Id.*, at 732-733.

The consent decree that was entered in the police case following the First Circuit's 1972 decision had as its sole and express purpose the remedying of the above-described unintentional discrimination. No subsequent violations have been found, and the additional relief ordered in 1981, the propriety of which is at issue in this Court, likewise was adopted for the express purpose of providing additional remedies for those same violations. (Petition Appendix in No. 82-185, at 12-15 (hereafter "Fire App.")).

In the intervening years, of course, it has become established by decisions of this Court that unintentional discrimination does not violate either the Fourteenth Amendment (and thus does not violate § 1983) or § 1981. *Washington* v. *Davis*, 426 U.S. 229; *General Building Contractors Assn.* v. *Pennsylvaia*, —— U.S. ——, 50 LW 4975, 4977-79 (June 29, 1982). A threshold question, therefore, is whether the *additional* relief ordered in the police case in 1981 can be upheld as a "remedy" for supposed violations of §§ 1981 and 1983, when intervening decisions of this Court have made clear that those provisions were not violated. The answer to that threshold question could be dispositive of the police case, in which the only violations alleged, and found, were of §§ 1981 and 1983.

The court below asserted that "the pattern of relief which the present modifications in the decrees seek to preserve was *conclusively established* prior to those decisions" (Fire App. A-13; emphasis added). Thus, apparently it was proper in the court's view to build additional remedies upon the initial findings of violation even though it has since turned out that those findings were wrong. But a federal court cannot impose new "rem-

edies", which take from innocent private parties rights conferred by a lawful state statute, when at the time those "remedies" are imposed intervening court decisions have established that there is no proper predicate—no violation of law—for any remedy. The impropriety of the course followed by the lower courts follows *a fortiori* from the rulings of this Court that a defendant is entitled to be relieved of prospective application of an *existing* injunction when "the circumstances, whether of law or fact, obtaining at the time of its issuance have changed," *System Federation* v. *Wright*, 364 U.S. 642, 647, and in consequence the injunction "has been turned through changing circumstances into an instrument of wrong", *id.*, citing *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115. See also, *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 424, 437-438.[1] That the additional relief ordered here is, in the absence of a violation, an "instrument of wrong" is beyond question, for it deprives innocent persons of rights accorded by a lawful state statute, through the medium of the coercive power of a federal court acting without any federal justification for that deprivation.

For these reasons, the additional remedies ordered in the police case should be reversed without further inquiry; it is enough that federal courts are without power to order coercive remedies in the absence of any violation of law.

The posture of the fire-fighter case is somewhat different. In that case, the private plaintiffs who sought the additional relief at issue in this Court likewise rested their case solely upon §§ 1981 and 1983. But the United States had initiated a separate complaint, consolidated with that of the individual plaintiffs, alleging that the same practices also violated Title VII. The "not intentional" discrimination found was held by the First Cir-

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[1] The principle stated in text is no less applicable when the injunction from which relief is sought "has been entered . . . by consent." *Swift, supra*, 286 U.S. at 114-115.

cuit in 1974 to violate all three statutes. *Boston Chapter N.A.A.C.P., supra*, 504 F.2d at 1021, and the consent decree that followed was for the express purpose of remedying those violations (Fire App. A7, A12-A14).

While as explained above the findings of violation of §§ 1981 and 1983 cannot support the imposition of additional remedies, that is not true with respect to the Title VII finding, for Title VII *does* forbid the type of unintentional discrimination found here, *Griggs* v. *Duke Power Co.*, 401 U.S. 424. Accordingly, the propriety of the additional relief awarded in the fire-fighter case turns upon whether that relief is appropriate under Title VII—the issue to which we now turn.

II

The language and legislative history of Title VII show that the Title empowers the courts, on finding an unlawful employment practice, to provide complete equitable remedies to the individuals who suffered adverse employment consequences by reason of that unlawful practice but does not empower the courts to provide affirmative remedies to individuals who have not suffered such adverse employment consequences.[2]

1. The unlawful employment practice committed here is stated in § 703(a) which provides that:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of em-

[2] Our showing is limited to "affirmative" relief because an employer who has engaged in discrimination in the past may be enjoined from continuing such discrimination in the future, and that injunction will inure to the potential benefit of all members of the group that the injunction insulates from discrimination. Such an injunction differs in kind from the affirmative relief Congress meant to be available only to actual victims.

> ployment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [Emphasis supplied.]

As this Court emphasized in *Connecticut* v. *Teal*, —— U.S. ——, 50 L.W. 4716, 4720 (June 21, 1982):

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1), (b), (c) . . . .

The logic of the statute then is to protect individuals who suffer discrimination by reason of their race, color, religion, sex, or national origin and not to protect "minority group[s] as a whole." It follows from that logic that it is the individuals who have suffered such discrimination by the respondent and not individuals who are members of a minority group but who have not suffered such discrimination who are entitled to secure Title VII's protections.

2. The sole Title VII provision defining the remedies that a court may order upon finding a violation of the statute is § 706(g). As enacted in 1964, § 706(g) provided:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, em-

> ployment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

The last sentence states that even where a court "finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful Title VII employment practice," the resulting remedial order may *not* run in favor of an individual who suffered adverse employment consequences for "any reason other" than such discrimination. Certainly then the literal language of § 706(g) bars a remedial order that runs in favor of individuals who are members of a minority group but who have never suffered employment discrimination at the hands of the respondent. A quota remedy—*viz.* a remedy providing employment benefits to members of a minority group who have not been shown to have suffered adverse employment consequences by reason of the respondent's unlawful employment practice—therefore appears on the surface to be the very paradigm of the remedial order Congress determined should *not* issue in enacting the 1964 Civil Rights Act.

Moreover, as a comparison of § 706(g) and § 10(c) of the National Labor Relations Act (NLRA), as amended, suggests, and as Senator Humphrey—one of Title VII's primary sponsors—confirmed (p. 9 *infra*), § 706(g) was modeled on § 10(c). The decisions under § 10(c) of the NLRA are thus an informative guide to the intent of the Congress that enacted § 706(g). *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 769, 774-775 and n.34; *Albemarle Paper Co.* v. *Moody*, 422 U.S.

405, 419; *Teamsters* v. *United States*, 431 U.S. 324, 366-367; *Ford Motor Co.* v. *EEOC*, —— U.S. ——, 50 L.W. 4937, 4939 n.8 (April 20, 1982). It was well settled by 1964 that when an employer is found to have discriminated against union members in violation of § 8(a)(3) of the NLRA, the remedy provided under § 10(c) by the National Labor Relations Board is to reinstate the victims of the discrimination and award them backpay and rightful place seniority. In the NLRA's history an employer had never been directed to give preferential treatment to union members who were not victims of the violation. See *Franks*, *supra*, at 774-775, n.34; and see, *e.g.*, *Nevada Consolidated Copper Corp.*, 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105 (1942); *Consolidated Dairy Products*, 194 NLRB 701 (1971); *Great Lakes Bridge & Dry Dock Co.*, 169 NLRB 631, 635 (1968); *The Hughes Corp.*, 135 NLRB 1222, 1223 (1962); *Atlantic Maintenance Co.*, 134 NLRB 1328, 1330 (1961), enforced, 305 F.2d 604 (3d Cir. 1962).

3. Title VII's sponsors repeatedly confirmed that the Title does not empower the courts to issue quota remedies.

a. Before the 1964 debate began, the bill's opponents cited quota remedies as one of the evils that would be produced (H.R. Rep. 914, 88th Cong. 1st Sess. (1963) at 72.) These opponents declared this "a not too subtle system of racism-in-reverse". (*Id.* at 73.)

When the bill reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" that had been leveled against the bill (110 Cong. Rec. 1518):

> In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against

> one or more of his employees because of race, religion or national origin. . . .
>
> *Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination.*[3]

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas* in businesses or unions and does not permit interferences with seniority rights of employees or union members. [*Id.* at 6566; emphasis added].

b. When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the bill, undertook a description of each of the Titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). *No court order can require hiring, reinstatement, admission to*

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[3] *Ibid* (emphasis added). See also *id.* at 1600 (Rep. Minish) ("no quota system will be set up").

membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted, without change, as § 706(g)].

• • •

Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times; but is nonexistent. [*Id.* at 6548 (emphasis added)]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges*

> *which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.* [*Id.* at 6563 (emphasis added)].

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose, as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[4] The April 11, 1964, issue of the Newsletter, published two days after the filibuster had begun, declared:

> Under title VII, *not even a Court*, much less the Commission, *could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.* [*Id.* at 14465; emphasis added].

On May 25, Senator Humphrey introduced a brief explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay, . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not pro-*

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[4] *Id.* at 5042. It is apparent from the numerous references to the Newsletter that the publication was widely read by Senators. See *id.* 5044, 5046, 5079, 7474, 8369, 8912, 9105, 9870, 10622, 12210, 14464.

> *vide that any quota systems may be established to maintain racial balance in employment.* [*Ibid.*]

Significantly, we have not found a single instance in which any proponent of Title VII ever suggested that the Title provided for or permitted court ordered quotas.

c. We have recounted above those statements by proponents that unquestionably addressed the question whether courts were empowered to award quotas for proven violations of Title VII. But these were not by any means the only "anti-quota" statements made by the bill's proponents. In addition to the charge that the EEOC and/or courts would impose quota remedies, opponents charged that racial imbalance would be found to be a *per se* violation of Title VII, and that employers would opt for quotas to avoid the *inference* of discrimination that might be drawn from racial imbalance.[5] In answering these various charges, the proponents repeatedly expressed Title VII's rejection of the concept of quotas. Some of these remarks were clearly responding to "quota" charges other than that courts would order quotas; others are ambiguous and may well have been specifically addressed to the charge that courts could order quotas. But all confirm that the proponents were opposed *in principle* to the government's imposition of quotas, and thus help explain *why* § 706(g) was drafted so as not to empower the courts to issue quota remedies. We set forth a number of these statements in the Appendix to this brief.

B. Everything said and done in 1964 leads to the conclusion that Congress in enacting Title VII intended to provide affirmative remedies for the victims of defendants' discrimination but not for non-victims. That intent as we have shown is crystalized in positive statutory law in both the basic substantive provision of the Title—§ 703—and in the basic remedial provision—§ 706(g). Nothing Congress has said or done since provides a basis for reading

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[5] See, e.g., *id.* at 5092 (Sen. Hill); 7418-20 (Sen. Robertson); 7800, 8500-01 (Sen. Smathers); 8618 (Sen. Sparkman).

Title VII as amended differently in this regard from Title VII as originally passed.

1. The only legislative act in the interim is the passage of the Equal Employment Opportunity Act of 1972 which amends Title VII in several respects. In essence, the 1972 law amends §§ 701, 702 and 704 to broaden Title VII's scope of coverage, and amends §§ 705 and 706 to grant the EEOC the authority to investigate charges and to bring suits in federal court. Section 703 of Title VII was not amended at all and the only arguably pertinent changes made in § 706(g) were the following additions to its first sentence (the new language is indicated in italics):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the Complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*

The italicized language had its origin in an amendment introduced by Senator Dominick, who was leading one faction of a filibuster against the Senate Labor Committee bill. The most significant aspect of the Committee bill—and the principal issue causing the filibuster—was a proposal to confer "cease and desist" authority on the EEOC; that bill proposed to make no change in either § 703(a) or § 706(g). Adoption of the Dominick Amendment, which denied the EEOC independent enforcement power and instead empowered the EEOC to institute law suits in federal court, was the key to ending the filibuster. Neither Senator Dominick nor anyone else explained or even discussed the purpose of the additional language in the first sentence of § 706(g), and the only

explanation therefor is that contained in a Section-by-Section Analysis prepared by Senator Williams, the chairman of the Labor Committee and the manager of the legislation (118 Cong. Rec. 7166, 7168):

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without backpay, as will effectuate the policies of the Act. Backpay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* [Emphasis added].

As this Court explained in *Franks, supra*, 424 U.S. at 764 n.21, the Congress that "added the phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." And, the Court understood the portion of the Section-by-Section Analysis

quoted above to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution, making whole insofar as possible the victims of racial discrimination . . .*" *Id.* at 764 (emphasis added).

There is not a word in the legislative history to suggest that "other equitable relief" was added to § 706(g) to authorize quota remedies, and it is hardly conceivable that so profound a departure from the anti-quota decision made in 1964 would have been accomplished without some evidence of an intention to do so.

2. It has been suggested that even granting that the 1964 and 1972 Congress' *legislative actions* did not provide support for the proposition that Title VII provides remedies for non-victims, the judicial power to order such remedies may properly be inferred from certain congressional *refusals to act.* Relying on such inferences is hazardous at best; indeed, in light of the twin restraints imposed by the exclusive grant in the Constitution to the Congress of all legislative power and by the requirement that Congress to make a law must take *all* the steps specified in the Constitution, there is a substantial argument that congressional inaction is never a proper basis for Executive Branch or Judicial Branch action. But there is no need here to engage in that debate. For in this instance the congressional determinations in 1972 not to amend the 1964 Act do not in fact support the inference that the paradoxical purpose of certain refusals to alter Title VII was to signal a new consensus that both victims of the defendant's discrimination and non-victims alike were entitled to affirmative relief under Title VII.

a. The court below in its 1974 decision upholding a quota in the fire-fighter case dismissed the question of the "intent of the framers of Title VII [as] largely ancient history." 504 F.2d 1017, 1028. That court believed that the 1972 Congress' intent respecting court-ordered qoutas was the opposite of the 1964 Congress' intent:

> [P]articularly the failure of Congress to pass the Dent Amendment, which would have foreclosed all affirmative action plans and racial balance relief, lend[s] support to an inference that Congress ratified the power of the courts to impose color-conscious relief of the sort that had been approved in several cases at the time the attempts to amend the amendments failed. [*Ibid.*]

Review of the history of the Dent Amendment leads to just the opposite conclusion.

That history begins with the House Labor Committee reporting out H.R. 1746, a bill introduced by Representative Augustus Hawkins for himself and sixteen others. The bill proposed, *inter alia*, to give the EEOC "cease and desist" powers, to extend Title VII to public employment, and to transfer the authority to administer Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC. Although the report (H. Rep. No. 92-238, 92nd Cong., 1st Sess. 1971) accompanying the House Labor Committee bill contained no indication that the EEOC would have power to order quotas, the bill was perceived by some as having that effect (for the bill proposed transferring to the EEOC the powers of the OFCC to enforce Executive Order 11246, and the OFCC had required quotas in *its* administration of the Executive Order).

On the eve of the commencement of the House debate, Representative John Dent, the chairman of the subcommittee that reported the bill out and the Committee bill's floor manager, made the following declaration:

> Mr. Speaker, although the bill was reported by the Committee on Education and Labor some time ago by a rather substantial vote, I would be less than realistic if I did not recognize the deep concern many Members have with certain of its provisions. . . . In spite of our explanations, the fact remains that some provisions appear onerous to a majority of my colleagues.

> In an effort to make the bill conform to the will of a majority, I propose to offer three significant amendments on Thursday. [72 Leg. Hist. 189].[6]

One of Representative Dent's proposed amendments was to add a sentence to the bill providing:

> The Commission shall be prohibited from imposing or requiring a quot[a] or preferential treatment with respect to numbers of employees, or percentage of employees of any race, color, religion, sex, or national origin. [*Ibid.*].

The purpose of this amendment was explained as follows:

> My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. *Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.* [*Id.* at 190; emphasis added].

Debate began the following day, pursuant to a Rule (*id.* at 150-151) under which, after three hours of general debate, Representative Erlenborn could offer "as an amendment in the nature of a substitute" his bill (H.R. 9247), which differed radically from the Committee bill. The Erlenborn substitute proposed (a) not to give the EEOC cease and desist powers, (b) not to extend Title VII to public employment, and (c) not to transfer administration of Executive Order 11246 to the EEOC. Additionally, the substitute proposed to abolish Title VII class actions, and to make Title VII the exclusive statute

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[6] We use "72 Leg. Hist. ——" to refer to "Legislative History of the Equal Employment Opportunity Act of 1972," prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972).

regulating employment discrimination (thereby repealing, *inter alia*, the Equal Pay Act and § 1981 insofar as it applied to employment). In lieu of the "cease and desist" power proposed for the EEOC in the Committee bill, the Erlenborn substitute proposed to empower the EEOC to file Title VII actions in federal court. (*Id.* at 326-332).

Representative Carl Perkins, Chairman of the House Labor Committee, made the opening statement on behalf of the Committee bill. After describing its basic features, he announced that in light of "intensive . . . criticisms" the Committee planned to put forward at the appropriate time certain amendments, among them the prohibition of Executive Order quotas that Representative Dent had forecast the day before. (*Id.* at 199.)

Representative Quie made the opening statement in opposition to the Committee bill. As one of the arguments against transferring to the EEOC authority to administer Executive Order 11246, he noted that confusion would result "from the fact that OFCC has imposed requirements on Federal Government contractors which it is questionable may be imposed under the statute [i.e. Title VII]". (*Id.* at 202)

Representative Hawkins then spoke in support of the Committee bill. He stated, *inter alia*:

> [*S*]*ome say that this bill seeks to establish quotas . . . Not only does Title VII prohibit this,* but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. [*Id.* at 204; emphasis added].

In response to a question from Representative Erlenborn as to whether Representative Hawkins supported the proposed Dent amendments, Representative Hawkins responded: "The amendments were discussed with me, I am very well aware of them, and I support all three." (*Id.* at 208.) Representative Hawkins added that Title

VII already "prohibits the establishment of quotas." (*Id.* at 209.)

Representative Steiger, a proponent of the Erlenborn substitute, declared the Committee bill's proposed transfer of power to enforce the Executive Order from OFCC to EEOC "a mistake." While stating that "I will not take the time to detail the reasons which relate to the genesis of the two agencies, their differing guidelines and different purposes" (*id.* at 223), Representative Steiger *did* "take the time" to attempt to sow dissension in the ranks of the Committee bill supporters. He "admit[ted]" to "being absolutely appalled" by the amendment Representative Dent "intends to offer", which would accompany the transfer of power from OFCC to EEOC with a "subverting [of] the Philadelphia Plan and the Office of Federal Contract Compliance's effort to carry forward an affirmative action program" (*id.* at 222).

> I intend to vote against it. I hope the House rejects it. The simple way to reject that amendment . . . is to adopt the Erlenborn substitute and to settle the question once and for all. [*Ibid.*]

A number of Committee bill supporters found this suggestion unpersuasive, noting that despite the civil rights mantle donned by Representative Steiger his suggestion would mean abolition of Title VII class actions, repeal of the Equal Pay Act and of § 1981's application to employment, denial of cease and desist power to the EEOC, and a refusal to extend Title VII to public employment. See, e.g., *id.* at 223-224 (Rep. John Conyers); *id.* at 232, 269-272 (Rep. Fauntroy); *id.* at 233-234 (Rep. Parrin Mitchell); *id.* at 236-239 (Rep. Drinan); *id.* at 264, 285-286 (Rep. Hawkins); *id.* at 274-277 (Rep. Abzug); *id.* at 299-301 (Rep. Stokes).

Representative Erlenborn offered a reasoned explanation of why he thought it preferable to keep administration of the Executive Order in a separate agency from that which administers Title VII:

> The OFCC is an altogether different type of jurisdiction [from the EEOC]. It is not based upon con-

stitutional rights. It is not based upon statutory rights.

> The genesis of the power of the OFCC is the contractual relationship that exists between the Federal Government and those with whom they contract for the acquisition of goods and services. *In this jurisdiction the OFCC can and does go beyond those powers granted by the 1964 Civil Rights Act.* I think it is important to note that the Chairman of the Equal Employment Opportunity Commission himself has testified that you cannot mix these two enforcement authorities. [*Id.* at 231; emphasis added].

From that point forward, there were only sporadic references to the proposed Dent amendment. [*Id.* at 234-235, 252, 259, 260, 261]. But Representative Erlenborn correctly identified the narrow scope of the dialogue by pointing out that *neither the Committee bill nor the Erlenborn substitute "is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act"* [*Id.* at 261].

Throughout, as was also true in the Senate, the debate focused primarily on other questions: Should the EEOC be given "cease and desist" power? Should Title VII be extended to public employment? Should administration of the Executive Order be in the Department of Labor or the EEOC? (See, generally, *id.* at 191-311).[7]

Under the parliamentary procedure agreed to, the House voted first on the Erlenborn substitute. The Committee bill supporters had made a tactical decision not to offer amendments that would make the substitute more palatable. (*Id.* at 254) Despite that decision, the Erlenborn substitute passed by a vote of 200-194. (*Id.* at 312-314) The alignment was that traditionally associated with controversial civil rights legislation. Those who ordinarily took the "conservative" stance on such legisla-

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[7] Indeed, so clear had it become that the battle lines were drawn on a number of major themes that Representative Steiger eventually retracted his earlier suggestion that votes be determined by views about the Dent amendment. (*Id.* at 279)

tion voted for the Erlenborn substitute; those who traditionally took the "liberal" stance (including all members of the Black Caucus) voted against. Approval of the substitute ended further consideration of the Committee bill; the Dent amendment was never formally offered, and never voted upon—the amendment had become moot, as jurisdiction over the Executive Order remained in the OFCC.

Thus the First Circuit's hypothesis that the "failure of Congress to pass the Dent Amendment" indicated a Congressional approval of court-ordered quotas under Title VII (504 F.2d at 1028) fails: Not a single representative suggested at any point in the debate that quotas could—or should—be available to remedy Title VII violations. On the contrary, it was common ground that quotas were *not* available under Title VII and that Title VII should not provide for quotas.

The House debate just reviewed also refutes the First Circuit's view that the 1972 Congress approved the scattering of lower court decisions at the time standing for the proposition that Title VII authorizes quota remedies —decisions too few in number and too sharply contested by other lower courts and the commentators in any event to be considered the uniform and settled "law" as to Title VII's meaning.[8]

The federal courts have no authority to make new law by altering a statute or to set Congress' agenda by presuming that once a statute has been so altered the gloss created by a handful of lower court decisions, no matter how erroneous it is when judged against the underlying legislative materials, is frozen into the statute if those decisions are called to Congress' attention and the legislature does not respond by passing a new law restating in more emphatic terms the original legislative

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[8] See, e.g., the district court decision in the police case herein, *Castro* v. *Beecher*, 334 F.Supp. 930, 945 (D. Mass. 1971), which had not yet been reviewed on appeal at the time Congress acted in 1972; *Developments in the Law—Title VII*, 84 Harv. L. Rev. 1109, 1114-16 (1971).

intent. A later Congress may, to be sure, exercise the legislative power by stating that without regard to whether a particular judicial construction of a statute passed by an earlier Congress is erroneous, the later Congress in reenacting the statute desires to incorporate that construction into the statute. Moreover, this Court has said that

> Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." [*North Haven* v. *Bell*, —— U.S. ——, 50 L.W. 4501, 4507 (May 17, 1982), quoting *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10.]

But that, of course, is only a rebuttable presumption. There is no evidence in the House debates in 1972 that the House was aware of the lower court decisions ordering quotas. And, it is dispositive that the debate just reviewed shows that in 1972 the House was of the view that Title VII as passed in 1964 was intended to bar quotas and that the Title as amended by the House would and should continue to bar quotas. As we have seen, all factions agreed on both propositions. There is not a word in the House debate questioning that reading of the 1964 Act or suggesting that Title VII as amended would, could or should be read differently.

b. In contrast to the House, there was one amendment proposed in the Senate that did bear, at least in part, upon the power of courts to order quotas under Title VII. Senator Ervin proposed to add a new section at the end of the bill providing:

> No department, agency, or officer of the United States shall require any employer to practice discrimination in reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges [72 Leg.Hist. 1017].

The proposal was one of numerous amendments that Senator Ervin was introducing as a means to prolong the filibuster in which he was a leading participant. This particular amendment, he explained, was addressed primarily to the OFCC's adoption of the Philadelphia Plan, and secondarily to "[t]he EEOC", which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." (*Id.* at 1042-45.)

Senators Javits and Williams spoke against the amendment. Senator Javits discerned two evils in the proposal:

> [I]t is clear that what is sought to be reached is, first the Philadelphia plan and similar plans in other cities, and beyond that, the whole concept of "affirmative action" as it has been developed under Executive Order 11246 and as a remedial concept under Title VII. [*Id.* at 1046; emphasis added].

With respect to the latter, Senator Javits cited two recent court decisions that he feared the amendment would "undo": a Ninth Circuit opinion that, as he described it, approved a remedy imposing "an affirmative duty for minority recruitment" (*id.* at 1048), and a district court decision in which "an affirmative order was actually entered requiring a union local to take in a given number of minority-group applicants" (*ibid.*). Senator Javits also cited two consent decrees recently entered: one in which "part of the decree required that 166 Negroes and Puerto Ricans be given preference—in filling future vacancies for which they were qualified," and another in which "the company agreed to make a good faith effort to hire from three minority groups for 20 percent of the clerical positions to be filled in the next 3 years" (*id.* at 1071).

Senator Williams opposed the amendment on broader grounds:

> I do not believe that it is the intent of the Senator from North Carolina to deny to the judicial and executive branches of Government all power to remedy the evils of job discrimination; but I am afraid—

> I am desperately afraid—that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination.
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> • • •
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> . . . This amendment raises the real threat of destroying any potential for effective law enforcement. If this amendment is accepted, I earnestly suggest that we will have a law, but there will be little chance for order under the law again if this amendment should prevail. [*Id.* at 1072-73].

The amendment was defeated by a vote of 44-22 [*Id.* at 1074-75].

For several reasons, the rejection of the Ervin amendment cannot be taken as a congressional decision to alter the 1964 Congress' decisions that the remedial scheme of Title VII is for the benefit of victims of discrimination and that quota remedies are not authorized.

First, given the legislative dynamic in which the Ervin amendment was proposed—an ongoing filibuster that Senator Ervin was seeking to prolong through the introduction of multiple amendments—it is entirely possible that those seeking to end the filibuster (and who voted against *all* the amendments proposed by Senator Ervin) were deciding their vote not on the substance of each amendment, but on the tactical judgment that the way to end the filibuster was to vote down each amendment proffered by the proponents of the filibuster. The importance of such tactical considerations in the legislative process make it *always* dangerous to impute a new meaning to a previously enacted statute from the choice of a later Congress *not* to enact legislation.

Second, even if all who voted had listened attentively to the debate, and were voting strictly on the "merits" of the amendment as elucidated in that debate, the vote to defeat the amendment would shed no light on the views of a majority of the Senate as to the desirability of court-ordered quotas. While it is of course *possible*

that each Senator voting against the amendment was doing so to second Senator Javits' approval of court-ordered quotas, it is at least equally possible that those Senators were swayed by an interest in not disrupting administration of the Executive Order and/or a concern that Senator Williams' warning that the language of the amendment was so broad that "[i]t can be read to deprive . . . the courts of *any* power to remedy clearly proven cases of discrimination" was accurate. Surely, if the Senate had made a decision as fateful as overturning the considered decision of the 1964 Congress not to authorize quota remedies there would be stronger evidence than this from which to discover that decision. And in this respect it is especially noteworthy that the Section-by-Section Analysis which constitutes the definitive statement of the 1972 Congress' view of the remedial scheme focuses exclusively upon make whole relief for actual victims of discrimination (*supra*, p. 14).

Finally, even if a Senate decision favoring Title VII quotas could be gleaned from this equivocal evidence, it would remain true that the House was unalterably opposed to such quotas (*supra*, pp. 16-21). We know of no principle that would permit the overturning of a congressional decision made by both Houses and signed by the President simply because one house eight years later inferentially expresses a different view of what the law ought to mean.

III.

A. This Court's decisions regarding the remedial scope allowed by § 706(g) have consistently drawn the line where Congress intended that it be drawn: between make-whole relief for "actual victims of racial discrimination" (*Franks*, 424 U.S. at 772), which is permitted, indeed virtually required, and relief for non-victims of such discrimination, which is not permitted. In *Franks*, the Court stated (424 U.S. at 763-764, footnotes omitted):

> Last Term's *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), consistently with the congressional plan, held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418. To effectuate this "make whole" objective, Congress in § 706(g) vested broad equitable discretion in the federal courts . . . The legislative history supporting the 1972 amendments of § 706(g) of Title VII [quoted at p. 14 supra] . . . . is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.

The Court made clear that members of the plaintiff class in *Franks* who were found *not* to be actual victims of the defendant employer's discrimination—*viz.*, who were "not in fact discriminatorily refused employment as an ORT driver" (424 U.S. at 773 n.32)—would not be entitled to any equitable relief. *Id.* at 772-773, and n.32.[9]

The Court in *Teamsters* further developed the line drawn in *Franks*.[10] In *Teamsters*, the Court analyzed at

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[9] Under *Franks*, when a class violation of hiring discrimination is proved, the burden of proof shifts to the defendant to establish that individual members of the class who applied for the position or positions in question were not actually victims of the violation. This shift in the burden of proof is not equivalent to providing preferential treatment to non-victims. The issue remains, who were victims of the unlawful practice? Members of the class against whom the practice was committed—*e.g.* black applicants for jobs from an employer who was proved to have had an across-the-board practice of refusing to hire blacks—are presumed to be victims, unless the defendant proves otherwise. 424 U.S. at 773 n.32; see also *Teamsters* v. *United States*, 431 U.S. 424, 357-362.

[10] *Teamsters* involved a "pattern or practice" action brought by the Attorney General pursuant to § 707(a) of Title VII. Title VII contains no separate remedial provision for such suits. The *Teamsters* Court recognized that "[w]hen [in a pattern or practice suit] the Government seeks individual relief for the victims of the discriminatory practice," the Court's remedial powers are the same as if the suit had been brought by private plaintiffs. 431 U.S. at 361,

length the question of how to determine whether a claimant for relief is an actual victim of the litigated violation. 431 U.S. at 356-377. That lengthy discussion in *Teamsters* would, of course, have been meaningless if courts were empowered under Title VII to provide remedies to non-victims.

B. There is another equally important lesson to be drawn from this Court's decisions regarding the remedial discretion afforded to courts in fashioning remedies under Title VII—a lesson that indeed transcends Title VII and applies to all forms of employment discrimination actions: it is not equitable for a court to direct that, on the basis of race, an innocent employee be deprived of his job so that he may be replaced by an employee who was not the victim of any discrimination found by the court.

In *Teamsters*, the Court stated (432 U.S. at 374-375):

> [T]he extent to which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330. Cf. *Phelps Dodge Corp.* v. *NLRB* 313 U.S., at 195-196, modifying 113 F.2d 202 (CA2); 19 N.L.R.B. 547, 600; *Franks*, 424 U.S., at 798-799 (Powell, J., concurring in part and dissenting in part). Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably in-

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363-377. Thus, *Teamsters* applied the *Franks* analysis of § 706(g), limiting relief to those individuals who are actual victims, as the starting point for analysis. 431 U.S. at 363.

volved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what it workable." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201 (opinion of Burger, C.J.).

Only recently, albeit in a different context, this Court, in *Ford Motor Co.*, 50 LW at 4942, spoke to this same subject:

> Although Title VII remedies depend primarily upon the objectives discussed above, the statute also permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 723 (1978). See also *Teamsters* v. *United States*, 431 U.S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap back-pay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *American Tobacco Co.* v. *Patterson*, 456 U.S. ——, —— (1982) (quoting *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.
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> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong

> done him. We do not believe that "'the large objectives'" of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (citation omitted) require innocent employees to carry such a heavy burden.

Where, as in the instant case, a court is asked to direct that a non-victim of discrimination be given the job of an innocent employee, solely because that non-victim is the same race as other persons who were actually discriminated against by the employer, there is not the competition of legitimate interests that calls into play equitable discretion. To give the non-victim the job is not to "restore [him to his] rightful place" (*Teamsters*, 431 U.S. at 375)—he was not wrongfully deprived of that place in the first instance. On the other hand, the "innocent worker . . . unfairly relegated to the unemployment lines" as a result of such a court order would have a "wrong done him." *Ford Motor Co.*, 50 L.W. at 4942.

C. The court below did not purport to justify its decision in remedial terms. That court did not state, and in truth could not, that the order upheld would restore victims of discrimination to their rightful place. Rather, that court acknowledged the contrary (Fire App. A22): "The relief sought originally was not for individuals, but to correct a condition of racial imbalance." The court below thought that achieving racial balance was a means to avoid "poor police and fire protection for those who need it most." (Fire App. A25). But improving police and fire services is not a remedial objective of Title VII. Indeed, that rationale does not depend on there having been any violation of Title VII or any other anti-discrimination law.

It bears emphasis that this is not a case in which a public employer has chosen to engage in racial selection in order to serve perceived "operational needs," and in which the question presented is whether that choice violates Title VII. In such a case, there is grave doubt whether the employer's conduct could survive a § 703

challenge, as we explain in the margin.[11] But whatever might be the outcome of *that* case, the federal courts, in exercising their responsibility under § 706(g) to provide remedies for proven discrimination, may not award affirmative relief to non-victims to effectuate the courts' notions of how public services are best delivered.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

J. ALBERT WOLL
815 Fifteenth St., N.W.
Washington, D.C. 20005

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
GEORGE H. COHEN
1000 Connecticut Ave , N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

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[11] In the 1964 Act, Congress excluded race from the "bona fide occupational qualification" exception, § 703(e)(1), and the legislative history makes clear that the omission was deliberate. As explained by Chairman Celler:

> We did not include the word "race" because we felt that race or color would not be a bona fide qualification, as would be "national origin." That was left out. It should be left out. [110 Cong. Rec. 2550].

An amendment to include race in § 703(e)(1) was defeated by voice vote (*ibid.*). When Congress extended the Act to public employers in 1972, it did not amend § 703(e)(1). The only accommodation Congress made to the special needs of public employers is the exclusion of certain categories of employees from coverage under the Act, see § 701(f), an exclusion that does not embrace the employees in this case.

APPENDIX

The Republican sponsors of Title VII in the House, in their "Additional Views" to the House Judiciary Report, declared:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.[1]

Senator Clark, one of the bipartisan "captains" for Title VII, declared in his principal speech describing Title VII: "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."[2] At the conclusion of his speech he introduced a Justice Department letter that stated:

> There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . .[3]

And Senator Clark introduced written answers he had prepared to certain "objections" to Title VII that had been voiced, which included the following:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory.[4]

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[1] H. Rep. No. 914, *supra*, at 150.

[2] 110 Cong. Rec. 7207.

[3] *Id.* at 7207.

[4] *Id.* at 7218.

Senator Humphrey, in an extended colloquy with Senator Robertson, made the following remarks:

> I feel sure that the Senator from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.
>
> • • •
>
> [C]an the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of the segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?
>
> • • •
>
> I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there.[5]

Senator Allott, one of the Republican sponsors of the bill, in another colloquy with Senator Smathers, expressed his disapproval of governmentally-imposed quotas:

> I completely agree with the Senator that if an employer were required to employ a person on the basis of a quota, there would be no justification for that procedure under the American system . . .
>
> • • •
>
> The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.[6]

Senator Keating, in a colloquy with Senator Sparkman, secured the latter's agreement that "the bill does

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[5] *Id.* a 7418-20.

[6] *Id.* at 8500-01.

not provide in any way for quotas of any kind."[7] Senator Keating later declared, in response to a public advertisement that the bill would require quotas:

> The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .
>
> Title VII does not grant this authority to the Federal Government . . .
>
> An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution.[8]

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[7] *Id.* at 8618.

[8] *Id.* at 9113. In addition several Congressmen and Senators, recognizing that quotas would inevitably collide with the seniority rights of incumbent employees, cited protection of seniority systems as a reason for their opposition to quotas. See, e.g., the "Additional Remarks" of the Republican sponsors in the House, *supra* at 150; 110 Cong. Rec. 5423 (Sen. Humphrey); *id.* at 6563 (Sen. Kuchel); *id.* at 9113 (Sen. Keating); *id.* at 10520 (Sen. Carlson); *id.* at 11471 (Sen. Javits); *id.* at 15893 (Rep. McCulloch).